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SUMMARY OF MEETING

COMMITTEE ON LEGAL SERVICES

March 19, 2013

The Committee on Legal Services met on Tuesday, March 19, 2013, at 7:38 a.m. in SCR 354. The following members were present:

Senator Morse, Chair
Senator Brophy
Senator Guzman
Senator Johnston (present at 7:50 a.m.)
Senator Roberts
Representative Foote
Representative Gardner
Representative Kagan
Representative Labuda, Vice-chair (present at 7:41 a.m.)
Representative Scott

Senator Morse called the meeting to order.

7:39 a.m. -- Dan Cartin, Director, Office of Legislative Legal Services, and Sharon Eubanks, Deputy Director, Office of Legislative Legal Services, addressed agenda item 1 - Discussion of amicus participation in *Kerr v. Hickenlooper* and possible retention of legal counsel.

Mr. Cartin said Senate Joint Resolution 13-016 authorizes and directs the Committee to retain legal counsel to represent the General Assembly as amicus curiae in any pending or future lawsuit in which legislators are plaintiffs for the purpose of participating on the issue of the standing of those legislative plaintiffs when that standing is based upon an institutional

interest of the General Assembly. Pursuant to that resolution, Senator Morse asked that the Committee meet to discuss authorizing the participation of the General Assembly as an amicus curiae in the *Kerr v. Hickenlooper* lawsuit, which is currently pending on appeal before the United States Tenth Circuit Court of Appeals on the limited issue of the standing of the legislative plaintiffs based upon advancing the institutional interests of the General Assembly to enact laws on taxation and appropriations. If you first determine that the General Assembly should participate as an amicus curiae on the limited issue of standing, the second determination for the Committee will be who should be retained to draft and file the amicus brief with the Tenth Circuit. The Committee can address each of those questions by a separate motion.

Mr. Cartin said we'd like to briefly give you an overview of the standing issue on appeal before the federal court. The plaintiffs include five current legislators, Senators Kerr and Morse and Representatives Hullinghorst, Levy, and Court. Other plaintiffs are local government officials, educators, and education officials and citizens of Colorado. The plaintiffs filed this suit in their official capacities, without the authorization of the General Assembly, and the General Assembly is not a party to the suit. The plaintiffs claim that article X, section 20, of the Colorado constitution, which we know as TABOR, violates the guarantee clause and the equal protection clause of the United States constitution and the Colorado enabling act of 1875 by eliminating the General Assembly's plenary power to legislate on matters of taxation and appropriations, which, they allege, denies the state of Colorado and its citizens an effective representative democracy that is contrary to the constitutional guarantee of a republican form of government. As part of their claims, the plaintiffs argue that TABOR has inflicted an institutional injury upon all of the members of the General Assembly through the nullification of their ability to enact taxes to provide for the state's expenses, thus rendering the General Assembly unable to effectively fulfill its legislative obligations in a representative democracy and a republican form of government. The attorney general, who represents Governor Hickenlooper, filed a motion on behalf of the governor, asking the federal district court to dismiss the lawsuit on several grounds, including the ground that all of the plaintiffs lack standing to bring the lawsuit. The district court denied the motion to dismiss on all of the grounds except the equal protection claim, thus permitting the plaintiffs to pursue the lawsuit on the remaining claims. As part of its decision, the federal district court found that the legislator-plaintiffs have standing to maintain the lawsuit based upon the institutional interest of the General Assembly to enact taxes and appropriate money. Governor Hickenlooper has appealed this holding and other holdings of the district court that are favorable to the plaintiffs to the Court of Appeals for the Tenth Circuit where the lawsuit is currently pending. That's where Senate Joint Resolution 16 and the Committee's determination this morning intercept. Specifically, the first full "WHEREAS" paragraph on the second page of the resolution says despite not being expressly authorized, individual legislators may still have a sufficiently cognizable injury to establish standing for purposes of advancing an institutional interest if a core legislative power of the General Assembly, and thereby the ability of its members to fulfill their official

responsibilities, has been nullified or eliminated. In this instance, the plaintiffs have claimed, and the district court has agreed, that the ability of the General Assembly to enact taxes to provide for the state's expenses is a core legislative responsibility that's been nullified, which, the court held, is a concrete institutional injury common to all members of the General Assembly sufficient to infer standing upon those legislators to allege that institutional injury. The district court's conclusion that the plaintiffs have standing is on appeal before the Tenth Circuit and that's the discreet issue before the Committee today. The initial determination for the Committee pursuant to Senate Joint Resolution 16 is whether it is in the best interest of the General Assembly and the state of Colorado for the General Assembly to participate as amicus curiae in *Kerr v. Hickenlooper* on the limited issue of the standing of the legislator-plaintiffs to advance the institutional interests of the General Assembly and the taxation and appropriation powers.

Senator Morse said this resolution is all about us participating as amicus curiae whenever standing is at issue, not this particular case. Is that an accurate assessment? Mr. Cartin said that is correct.

Senator Morse said we are trying to decide whether to do that in this particular case but we'll never need another one of these resolutions. We'll be able to come directly to this Committee any time we think there's a standing issue and ask to do an amicus brief, or will we have to do another resolution? Mr. Cartin said I think the way the resolution is written it would provide grounds for a future legislator to raise the issue with the Committee and bring it back to the Committee on some other future, pending lawsuit.

Ms. Eubanks said but only on this limited issue of standing based on an institutional interest of the General Assembly.

Representative Gardner said if I understand the resolution, the resolution is about individual members of the General Assembly asserting standing, not the entire General Assembly by resolution itself asserting standing. Do I have that right? Mr. Cartin said yes, that's correct. What we've seen in the past is a joint resolution by the body authorizing participation in a particular proceeding or perhaps as amicus in a particular proceeding, and the entire body could weigh in on the issue of the General Assembly having standing in that proceeding. This resolution, as you have accurately characterized it, goes to those situations where individual legislators have filed the lawsuit, the General Assembly is not a party, and the General Assembly may want to weigh in as amicus on the standing issue.

Representative Gardner asked can you tell me what situations we've had in the past that involve individual legislators asserting that they have standing on behalf of the entire General Assembly? Mr. Cartin said to our knowledge, that particular scenario where individual legislators have asserted standing based on an institutional interest of the General Assembly where the General Assembly is not a party has not occurred.

Ms. Eubanks said I would like to note that there have been two cases we are aware of where individual legislators brought lawsuits that basically advocated an institutional interest. Those are old cases. Standing was never at issue, but they were not specifically authorized by the body to bring the lawsuits. They dealt with the power of appropriation. Standing was never an issue in those cases so they never directly dealt with the issue of whether individual members needed authorization by the body. It's been the practice when the General Assembly wants to participate that it does a resolution or goes to the executive committee during the interim. We are aware of at least two cases where individual members did bring actions dealing with institutional interests.

Representative Gardner said the question of standing was never addressed in those cases. The defense was never asserted or what happened there? Ms. Eubanks said the issue of standing was never raised in either of those cases and they were dealt with on other grounds.

Representative Gardner asked were they recent cases? Ms. Eubanks said I think the 1960s or 1970s.

Senator Morse said Senator Grossman - it may have been Representative Grossman at the time - sued over the supermotion issue in GAVEL. That was an individual legislator suing on an institutional interest as to whether or not the institution followed the rules. Does that not fit as one of your cases? Ms. Eubanks said in the Grossman situation, he was suing because of committee action on a particular piece of legislation that he sponsored and that was killed in committee. His assertion was that the procedure violated the constitution in terms of that process. He wasn't really representing the institutional interest in his lawsuit and he actually sued the General Assembly. He wasn't asserting an institutional interest.

Senator Roberts said a question that comes to my mind is, if this proceeds, do we run the risk of opening the door to any time even one legislator wants to make the case that he or she represents the institutional interest, we have no threshold that has to be met, such as two-thirds of the body has to agree that there is an institutional interest. In the Grossman instance, I can see a distinction as to why we would want to protect the individual legislators' right to committee due process. The concern I have is going forward on this, are we not going to throw open the doors to any one of 100 in any given year wanting this option of filing an amicus brief and drawing the whole General Assembly in because they individually had concerns? Where are the sideboards? Mr. Cartin said I think the sideboards, if there are sideboards - and I don't know if this would prevent the flood gate as Senator Roberts has characterized it - is that the resolution goes to those situations where there is a plaintiff-legislator in a legal proceeding and the issue is the standing of the legislator to advance an institutional interest where a core legislative responsibility has been impacted or nullified. Arguably, that is a narrow class of cases. I think that the legislature still has the right to do a joint resolution authorizing participation of the General Assembly as amicus on a standing issue where there are plaintiff-legislators, and not necessarily rely on this

particular resolution in every such instance. I think the resolution goes to a narrow class of cases involving standing of plaintiff-legislators to assert an institutional injury as a basis for their standing.

Representative Kagan said we are confronted with a resolution directing us to do certain things. Do we have a choice? Mr. Cartin said yes, the way the resolution is written gives the Committee a choice because of the language of the very last paragraph. It says in which the General Assembly is not a party on the limited issue of standing of the legislator-plaintiffs if the Committee determines that standing is based upon advancing any institutional interest of the General Assembly. I don't think the Committee is necessarily required to authorize participation as amicus in this particular proceeding by the very language of the resolution.

Representative Gardner said *Kerr v. Hickenlooper* is about one thing. It's about TABOR. Outside of TABOR and the legal theory for Senator Kerr's and Senator Morse's standing going to a core legislative power, I'm trying to figure out about what other core legislative power, other than TABOR and this taxing and appropriation power, would I as a member of the General Assembly say was being violated? Have you thought of any? Mr. Cartin said the main ones that we have identified are those legislative powers that are specifically in the constitution or that the courts have recognized, such as the power of appropriation, to provide a uniform school system, redistricting, and the legislative power in general, which is broad. I don't think there's a top ten we could give you. I think specifically, the power of appropriation and the power of taxation have been recognized as the responsibility of the General Assembly.

Representative Gardner said perhaps as an individual legislator I could ask the court to intervene in the *Lobato* case and basically say that the court doesn't have the authority to tell me to appropriate anything or to do anything as a legislator even if the constitution says so. I can say that I'm advancing an institutional interest and that being the case, when the inevitable standing challenge is raised - because I don't happen to believe that there is standing on the part of any individual legislator unless they have a particular wrong to them individually, as Senator Grossman did - I could come to the Committee and ask your Office to pay for an amicus brief. Is that a scenario that this resolution would support? Mr. Cartin said I think as you've characterized it, in the abstract, in a lawsuit where a legislator intervenes, and the legislator bases his or her standing on an institutional injury, that may come within the purview of this particular resolution.

Representative Kagan said if the executive branch were interfering with our ability to vote and a particular legislator was prevented from voting by being required to meet with one of the governor's staff at the time when votes were taking place, might that not be a constitutionally unsound action by the executive branch that warranted an individual legislator to challenge the actions of the executive on the basis of the constitutional privileges and immunities that are given to legislators and to do so on behalf of the entire General

Assembly? Mr. Cartin said given the scope of the resolution, we would probably want to give a little more thought to that particular scenario and whether or not the resolution addresses that for purposes of amicus participation on the issue of the standing of that legislator. That's not a direct answer, but I go back to the resolution which is directed at situations where plaintiff-legislators in lawsuits where the General Assembly is not a party assert standing based upon an institutional injury. I'm reluctant to opine on that particular scenario right now.

Senator Roberts said Representative Gardner's questions followed my concern, which is, regardless of this particular instance, are we setting a precedent for drawing in your Office any time one of 100 legislators wants to assert that they alone represent institutional interest? I'm trying to find the line of demarcation. Where does one legislator get to claim that they represent institutional interest such that it draws you in and the resources of the legislature in? In this instance there was more than one legislator, but what would stop one legislator from asserting the same? Perhaps it would be someone like former Representative Bruce who would have a completely different take on this related to TABOR. What would stop Representative Bruce from asserting that your Office needs to intervene or file a brief on behalf of the entire General Assembly with no threshold that has to be reached? Ms. Eubanks said first of all, I think it's important to recognize that *Kerr v. Hickenlooper* is the first such instance that we're aware of in terms of this type of scenario. In terms of in the future, is it possible? Yes. In terms of drawing the line, I don't know that it's necessarily drawing our Office into the mix. I think it's drawing the Committee into the mix based on the language of the resolution. I don't think you can prohibit an individual member from filing a lawsuit asserting standing based on an institutional interest of the General Assembly. Whether or not that member would like the General Assembly to weigh in as amicus then draws in the Committee to make a determination as to whether or not that's an appropriate thing for the General Assembly to do. I don't think it automatically creates participation. I think it draws in the Committee to make a determination as to whether participation is appropriate.

Senator Roberts said I guess this always gets reduced to a political question of who's in power. Is that not a fair assessment that it will always be whoever holds the majority, and not necessarily a threshold of two-thirds of the General Assembly? It's going to be the majority of this Committee.

Senator Morse asked can you tell us where two-thirds is from? Senator Roberts said that's just a random number, but I'm trying to say a super majority threshold before the General Assembly would be drawn in or, more particularly, the Office and the legislative branch resources. We have no benchmark to shoot for. I just picked a super majority as something other than 50% plus one. What I'm hearing Ms. Eubanks say is that if it always resides with this Committee, it's going to be a political decision based on the majority party.

Senator Morse said this resolution started with instructing this Committee to file an amicus brief and then was amended into the form it is now. Had it passed as originally written, it still

would have taken just 18 senators and 33 representatives to basically instruct this Committee to find a lawyer to write the amicus instead of instructing this Committee to think about whether or not to do it and, if so, then hire a lawyer. It doesn't ever seem to be anything more than 18 and 33 to do this as opposed to a super majority, whether we decide to file a lawsuit as an institution or to take action through this Committee to support or oppose a lawsuit that's been filed otherwise.

Mr. Cartin said for a joint resolution to pass, it's a majority vote on whether or not to authorize either participation in a lawsuit or the initiation of a lawsuit by the General Assembly as a body. As to Senator Roberts' second question on whether every future instance that may come before the Committee will be reduced to a political question, I don't know if that will necessarily be the situation in all circumstances.

Senator Roberts said but if it's decided in this Committee, it will be a majority vote. The only way I can see around that is if we have some sort of guidance, such as a bill that set a certain threshold. I just think that it's not just this instance but I think the Committee members ought to be thinking if we are setting a precedent. Roles can be reversed in terms of who is in charge, and I think for the legislative record and history it's important to know that the Committee took this course knowing that in the future other Committee majorities could tell the Office to insert themselves and spend resources to write a brief. To assert an individual legislator's rights is one thing. To assert institutional rights, as if one person speaks for 100, is concerning to me.

Ms. Eubanks said in terms of past participation by the General Assembly in various lawsuits, at times the institutional interest has transcended politics in terms of when the General Assembly was controlled by one party and the executive branch was controlled by the same party and the General Assembly still sued the governor. There have been instances and I guess I'm an optimist that members think of the institutional interest, but I also understand the reality of the situation.

Representative Gardner said I take issue with Ms. Eubanks' statement. I don't think the institutional interest ever transcends the politics. I think the politics may dictate that the institutional interest is superior because politics transcends partisan matters and it has to do with separation of powers sometimes and the power of the body. When I have seen that, both in my time here and prior to that, it has always been about the politics of maybe the General Assembly - Republicans and Democrats alike - and what they think their purview is and that's why the federal courts call these things political questions.

Representative Gardner said just to be clear for members of the Committee who may not have read the cases, this issue of standing seems to revolve around three different instances. One is where the General Assembly, by majority vote of both houses, passes a resolution and says we think there's an institutional interest. Two is a case, as in the Grossman case, where

Senator Grossman carries his own bill, he's subjected to a particular kind of treatment in committee, and he says to the court I have standing because my bill was treated in a particular way and while that may be institutional it is I that was wronged. I have personal standing because I was personally wronged. This seems to be a third case where only one United States supreme court has ever found standing for an individual member advancing an institutional interest and that is this case. In other words, the plaintiffs are saying we have standing because our institution has been generally wronged. Our institution hasn't voted to do this case but the General Assembly has been generally wronged and we individually have the right to bring that. That's the third case and it's not one that's been favored by the courts in the past. Do you agree with the three cases or is there some other kind of analysis to apply to this? Mr. Cartin said I find nothing to disagree with, relative to breaking down the three types of cases. That's a nice synopsis.

8:13 a.m.

Hearing no further discussion or testimony, Representative Labuda moved that the General Assembly participate as an amicus curiae in *Kerr v. Hickenlooper*, where it is currently pending before the Federal Court of Appeals for the Tenth Circuit as Case No. 12-1445, on the limited issue of the standing of legislator-plaintiffs which is based upon advancing the institutional interest of the General Assembly to enact laws on taxation and appropriations. Representative Gardner said I was distressed that the leadership of my own caucus in the Senate and the House did not take greater issue with the underlying resolution. This idea that an individual member of the General Assembly has standing is contrary to the notions of standing in the federal courts, and we are pulling the Office and the General Assembly budget into this. Perhaps I should go and see if I can intervene in *Kerr v. Hickenlooper* as a member of the General Assembly and see if I can get everybody to take my position, though I think the political climate would not allow for my amicus brief to be paid for opposing the notion of standing. I think this is a terrible road for us to go down. I don't think it is well-founded and I will be a no vote. Senator Brophy said I find it ironic that one, or in this case five, members of the General Assembly can assert standing on behalf of the General Assembly in a case that claims it is contrary to our republican form of government that the people of Colorado would limit the plenary powers of the legislature to raise taxes without a vote of the people because it's unrepublican for one or five members of a general assembly to assert standing on behalf of the general assembly when they clearly don't make up a majority as they make that claim for standing. I will be a no vote also. I do not like the precedent that it sets. The motion passed on a vote of 6-4, with Representative Foote, Representative Kagan, Representative Labuda, Senator Guzman, Senator Johnston, and Senator Morse voting yes and Representative Gardner, Representative Scott, Senator Brophy, and Senator Roberts voting no.

Senator Morse said we now move to the matter of who to hire to write the brief. Can you describe for us your recommendation? Mr. Cartin said it would be our recommendation that

the Committee and the General Assembly retain Maureen Witt of Holland and Hart. Holland and Hart and Ms. Witt have worked on a number of items over the past several years. They have the expertise and time to do the brief given the tight time frame. It is due with the court by April 18. That would be our recommendation. It is not our recommendation that our Office do the amicus, based on the time of year, the subject matter, and the level of expertise in the Tenth Circuit.

Representative Gardner said that's a very fine law firm and Ms. Witt is a very fine attorney. Do we have any estimate of what this is going to cost? Mr. Cartin said yes, the estimate is between $20,000 and $25,000.

Representative Labuda said you won't be actively involved in the case but are there one or two attorneys in the Office who might be involved, just to get some experience? Mr. Cartin said we would certainly extend that opportunity to one or more staff persons in our Office. It's a good idea. The reality is, there are 50 days left in the session and there's a lot to do. There may not be time for our staff to do that.

8:20 a.m.

Representative Labuda moved that Maureen Witt of Holland and Hart be retained to represent the General Assembly as an amicus curiae in *Kerr v. Hickenlooper*. Representative Gardner said I will be a no vote simply because I don't believe we should retain counsel and just in the interest of consistency. It's a good law firm. If this matter is going to be handled then it ought to be handled by a first-rate law firm. My no vote should be taken as that we should not be expending funds or retaining counsel for individual members to assert an institutional interest. They chose to do it and they need to assert it. The motion passed on a vote of 7-3, with Representative Foote, Representative Kagan, Representative Labuda, Senator Brophy, Senator Guzman, Senator Johnston, and Senator Morse voting yes and Representative Gardner, Representative Scott, and Senator Roberts voting no.

8:22 a.m.

The Committee adjourned.